Recent Decisions of the WWGMHB

July 20, 2005 - December 27, 2005

Adaptive Management

The Board agrees that for a small city which issues relatively few building permits, a workable adaptive management program is a real possibility. However, we cannot find this approach compliant without a description of how the monitoring and adaptive management program will be conducted, what scientific methods would be used, and how the effectiveness will be measured and monitored. *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

Best Available Science

…the Board must still find that the wetland buffers and exemptions do not comport with best available science (BAS). They do not comport with the only BAS included in the record, provided by the Petitioners and the Washington State Department of Ecology (Ecology). The City has neither provided a reasoned discussion of why it has departed from the BAS offered by an agency with expertise nor provided an alternative source of BAS. *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

RCW 36.70A.172(1) requires that BAS must be substantively included in the formulation of development regulations. We do not read RCW 36.70A.172(1) to require another BAS investigation for issuing permits. *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

While we find that RCW 36.70A.172(1) does not require a new BAS investigation at the time of permitting, we find, as we have in previous cases, that discretion in issuing permit decisions should be guided by specific criteria. The City's requirements for an extensive critical areas report by a qualified biologist, coupled with the requirement that habitat alterations or mitigations must protect the quantitative and qualitative functions and values of habitat conservation areas when permits are issued, make these regulations compliant. *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

Petitioners' argument that RCW 36.70A.172 must apply to all development regulations that may impact critical areas since other regulations could nullify the protections of the critical areas ordinance has no foundation in the GMA. First and foremost, the Board cannot impose a requirement that the GMA does not create. On its face, RCW 36.70A.172 only applies to the designation and protection of critical areas. "In designating and protecting critical areas under this

chapter…" Therefore, inclusion of best available science and special consideration of anadromous fisheries is only required in the adoption of critical areas designations and protections. While a best available science analysis of the impact of zoning regulations on critical areas might be useful, the GMA does not require it. *Overton et al. v. Mason County,* WWGMHB Case No. 05-2-0009c (Final Decision and Order, November 14, 2005)

If newly adopted regulations impact the effectiveness of the critical areas regulations, then the challenge to those new regulations would be that they violate the requirement to protect critical areas. However, this does not mean that they violate the requirement to include best available science in those protections. A challenge to development regulations that change the protectiveness of critical areas regulations would rest on RCW 36.70A.060 rather than on the failure to include best available science pursuant to RCW 36.70A.172. *Overton et al. v. Mason County,* WWGMHB Case No. 05-2-0009c (Final Decision and Order, November 14, 2005)

Buffers

…we find that in forest lands, determination of buffer widths for habitat areas on a case-by-case basis is consistent with the best available science in the record - the advice given by the Washington Department of Community, Trade and Economic Development (CTED) Critical Areas Assistance Handbook… we find that the City's requirements that an extensive critical area report must be prepared by a biologist with experience in the type of habitat being regulated and the general standard that the review will be based upon protecting the functions and values of habitat make this regulation compliant. *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

Critical Areas - Designation

…we find that the City did designate critical areas in the shorelines. The designation of "Areas With Which State or Federally Designated Endangered, Threatened, and Sensitive Species Have a Primary Association" and the designation of herring and smelt spawning areas as fish and wildlife habitat areas in Ordinance 2702 makes those areas in the shorelines "critical areas." RCW 36.70A.060. *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

Critical Areas in Shorelines

In light of the express legislative intent in adopting ESHB 1933, we find that the repeal of the prior critical areas regulations governing critical areas in the shorelines and the adoption of new critical areas regulations (some of which apply to critical areas in the shorelines) amend the City's shoreline master program. As a result, those amendments must be submitted to Ecology by the City for review and approval. *Evergreen Islands, Futurewise and Skagit County*

Audubon Society v. City of Anacortes, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

We note that the Legislature anticipated that critical areas regulations in the shorelines may be adopted and reviewed prior to adoption of the entire shoreline master program under revised shoreline guidelines. RCW 90.58.090(4). ESHB 1933 amends the SMA to provide that Ecology may approve the segment of a master program relating to critical area…

By applying the procedural and substantive terms of the SMA to critical areas regulations adopted and/or updated after the effective date of ESHB 1933, the SMA applies prospectively to ensure appropriate review by Ecology but does not delay application of the SMA to those critical areas when they are amended. Accordingly, we find that Anacortes' repeal of prior critical areas regulations applicable in its shoreline and its adoption of a new CAO in Ordinance 2702 must meet the requirements for a segment of a master program relating to critical areas in the shorelines. RCW 90.58.090(4). Further, the segment of the Anacortes' master program that relates to shoreline critical areas must be submitted to Ecology for review and approval before appeal to the Board may be had. *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

When the City repealed its existing critical areas regulations and enacted its new CAO through Ordinance 2702, it changed the regulations governing critical areas in its shorelines. This change is an amendment to its master program and must be reviewed by Ecology. *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

As we have said, the foremost consideration in construing legislation is to give effect to legislative intent. At the same time, we cannot help but be concerned with the impact of any construction of the statute we make. In this case, though, we find that the impact on protections for critical areas in the shorelines is positive. First, we note that there is nothing in this transfer of authority that in any way lessens protections for critical areas. ESHB 1933 expressly provides that "[S]horeline master programs shall provide a level of protection to critical areas located within shorelines of the state that is at least equal to the level of protection provided to critical areas by the local government's critical area ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2)." Second, the addition of Ecology's review and approval process can only benefit all parties, including the boards, in assuring appropriate protections are in place. The expertise that Ecology offers in reviewing master programs and amendments, together with the inclusive process that it brings to bear, will be of major assistance to the boards in applying sound scientific principles to the review of critical areas protections. *Evergreen Islands, Futurewise and Skagit*

County Audubon Society v. City of Anacortes, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

Invalidity

This Board has found that invalidity should be imposed where there is a reasonable risk that development will occur during the compliance remand period that will interfere with the local jurisdiction's ability to plan in accordance with the requirements and goals of the GMA. See, e.g., *Futurewise v. Whatcom County,* WWGMHB Case No. 05-2-0013 (Final Decision and Order, September 13, 2005) ("When there is a reasonable risk that the continued validity of comprehensive plan provisions and/or development regulations that the Board has found noncompliant will make it difficult for the county or city to engage in proper planning within those goals, we have made a determination of invalidity. See *Vinatieri v. Lewis County,* WWGMHB Case No. 03-2-0020c and *Irondale Community Action Neighbors v. Jefferson County,* WWGMHB Case No. 04-2-0011, as examples."

Clearly, the concern that inconsistent development might occur during the remand period is not present here. The agricultural activities in rural areas subject to the exemption from the critical areas buffer requirements at issue here are not "development" and, because they require no permits, applications for permits for those activities are not likely to vest during the remand period. *WEAN v. Island County, WWGMHB Case No. 98-2-0023c* (Order Finding Compliance as to Type 5 Stream Buffers and Denying Determination of Invalidity as to Agricultural Activities in Rural Areas, November 16, 2005)

WEAN relies upon Board decisions where a determination of invalidity was considered on the basis of the egregiousness of the violation; the length of time the violation has occurred; and the likelihood that the violation will continue to occur absent invalidation. These criteria may be seen as addressing a situation where a jurisdiction refuses to undertake reasonable compliance efforts and thereby substantially interferes with the fulfillment of the goals of the Act.

We do not find this to be the situation here. The County has a thorough and extensive public process in place to consider the use of best management practices to protect critical areas from the impact of agricultural activities in rural areas. As WEAN agrees, buffers are not the only method by which the functions and values of critical areas may be protected pursuant to RCW 36.70A.172. The County has proposed a reasonable time table to determine how best management practices may be used in rural lands and the Board will review the County's compliance efforts. *WEAN v. Island County*, WWGMHB Case No. 98-2-0023c (Order Finding Compliance as to Type 5 Stream Buffers and Denying Determination of Invalidity as to Agricultural Activities in Rural Areas, November 16, 2005)

Jurisdiction

The Board finds that it does have jurisdiction over these regulations because they are a new enactment of development regulations, over which the Board has jurisdiction pursuant to RCW 36.70A.280(1). *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)

Major Industrial Developments

The provisions of RCW 36.70A.210 require the establishment of a collaborative process between a county and its cities in developing county-wide planning policies. RCW 36.70A.210(2). The County represents through Exhibit 152 that the Planned Growth Committee includes representatives of all the cities in Lewis County. The minutes of the July 14, 2005, Planned Growth Committee show that the committee considered the changes to Ch. 17.20 LCC and approved them. This meets the requirements of RCW 36.70A.365 and 36.70A.367 for consultation with the cities. In the course of the mandated consultation on the process to be used, the County and cities could have agreed upon a process that provided for such continuous consultation, but they did not. RCW 36.70A.365 and 36.70A.367 by their terms only require consultation in the *establishment of the process* for reviewing and approving applications; those provisions of the GMA do not require that there be consultation on each application. *Vinatieri et al. v. Lewis County*, WWGMHB Case No. 03-2-0020c (Order Finding Compliance, November 23, 2005)

By their terms, major industrial developments under RCW 36.70A.365 and industrial land banks under RCW 36.70A.367 involve development outside of urban growth areas; the Legislature did not add to public participation requirements as a result but it did require consultation with cities in establishing the process for reviewing and approving such applications. This has been done here. Since major industrial developments under RCW 36.70A.365 and industrial land banks under RCW 36.70A.367 by definition occur outside of urban growth areas, the Legislature also requires specific undertakings to mitigate their impacts: buffers, environmental protection, development regulations to ensure urban growth will not occur outside their boundaries, mitigation of adverse impacts on designated natural resource lands, and protections for critical areas. RCW 36.70A.365(2)(c), (d), (e), (f), (g); RCW 36.70A.367(2)(a) and (b), (3)(c), (d), (e). However, the GMA does not subject these proposals to a greater degree of public participation than any other GMA action. *Vinatieri et al. v. Lewis County*, WWGMHB Case No. 03-2-0020c (Order Finding Compliance, November 23, 2005)

SEPA

Petitioners base their attack on the FSEIS on the absence of a consideration of a moratorium on certain kinds of land development (Petitioners' Brief on Belfair Issues at 4) and the failure to discuss reserving implementation of development

within the Belfair UGA. *Ibid* at 6-7. A moratorium on development would not attain the objectives of the proposal because it would not implement the existing plan policies on the Belfair UGA. While the County might have elected to revisit those plan policies, there is nothing in SEPA requiring them to do so. *Overton et al. v. Mason County,* WWGMHB Case No. 05-2-0009c (Final Decision and Order, November 14, 2005)

Timeliness

Those issues addressed to provisions of [the existing code] that were not raised when those provisions were originally adopted and were not amended by [the challenged ordinance] are not timely and may not be raised now. .. Unchanged comprehensive plan provisions and development regulations may not be challenged in a petition for review of subsequent enactments. *Wristen-Mooney v. Lewis County,* WWGMHB Case No. 05-2-0020 (Order on Motion to Dismiss, December 8, 2005)

Urban Densities

The change in urban residential densities allowed pursuant to the Belfair Urban Growth Area Plan does not reduce the allowable urban densities except in environmentally sensitive areas where densities of 3 dwelling units per acre (R-3) are allowed. MCC 17.22.110. Otherwise, the allowable urban residential densities are 5 per acre (R-5) (MCC 17.22.200) and 10 per acre (MCC 17.22.300) (R-10). Petitioner does not challenge the R-3 zone and offers no evidence to suggest that the County has not properly adjusted residential densities to allow for steep slopes and critical areas. Since the increase in allowable urban densities to 5 dwelling units per acre and 10 dwelling units per acre encourages urban densities within the established UGA, they are appropriate for the Belfair UGA. *Overton et al. v. Mason County,* WWGMHB Case No. 05-2-0009c (Final Decision and Order, November 14, 2005).

Updates

The Board's examination of the Ordinance shows that the City has not made "a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefore." Ordinance 2702, Opening Recitals and Findings. The Board concludes that, without such a finding, no update pursuant to RCW 36.70A.130(1), (2)(a), and (4) has occurred. Therefore, to the extent the City has not acted to update its CAO, any challenges to the sufficiency of that update under RCW 36.70A.130 are not ripe. *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Final Decision and Order, December 27, 2005)